

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KIM-LIEN NGUYEN)	
Claimant)	
)	
VS.)	
)	
CRYSTAL NAILS)	
Respondent)	Docket No. 1,010,545
)	
AND)	
)	
UNINSURED)	
Insurance Carrier)	
)	
AND/OR)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant requests review of the April 19, 2004 preliminary hearing Order entered by Special Administrative Law Judge Vincent L. Bogart.

ISSUES

The initial issue raised at the preliminary hearing was whether the parties are covered by the workers compensation act because it was alleged respondent did not have the requisite annual payroll of more than \$20,000.

The Special Administrative Law Judge (SALJ) determined the claimant did not sustain her burden of proof to establish that respondent had a sufficient annual payroll to be covered by the Workers Compensation Act.

The claimant requests review of whether respondent's annual payroll was enough to mandate coverage under the Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

It is the claimant's burden of proof to establish her right to an award of compensation and to prove those conditions on which the claimant's right depends.¹ Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in the Act.² K.S.A. 44-505(a)(2) exempts from application of the Kansas Workers Compensation Act the following:

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, **except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;** (Emphasis added)

In order to avoid being subject to the provisions of the Kansas Workers Compensation Act, the above statute establishes a two-prong test. First, the employer must not have had an annual payroll for the preceding calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than \$20,000 for all employees excluding family members.³

It was undisputed that claimant was an employee of the respondent in calendar year 2002. Claimant testified that her salary, before taxes were deducted, was \$250 per week. She also testified that respondent had two other employees but claimant did not know how much they were paid. However, respondent's owner confirmed that one other worker was also paid \$250 per week. But neither the claimant nor the other worker worked the entire year as the claimant was off work for approximately a month and the other worker for approximately two months.

A cursory calculation of wages paid claimant and the co-worker after deducting the alleged three months where no wages were paid while away from work could still result in

¹ *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

² *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

³ *Fetzer v. Boling*, 19 Kan App. 2d 264, 867 P.2d 1067 (1994).

a payroll exceeding \$20,000. But, the exact amount of time the claimant and her co-worker were absent from work and not paid was not established.

The uncertainty regarding respondent's payroll in calendar year 2002 was further compounded by respondent's tax filings. Although the records indicate wages paid of \$22,860, the owner testified that he did not know if that reflected wages paid to his wife and brother. Consequently, the claimant's attorney ended the respondent owner's deposition noting that respondent's accountant would be contacted in order to get additional tax records confirming who received wages in 2002.

There was further testimony that respondent had no employees in 2003 and, accordingly, would not anticipate a payroll exceeding \$20,000. Even if claimant were still an employee as she alleges, there were no records or testimony to determine whether respondent could reasonably anticipate a payroll exceeding \$20,000 in 2003.

Based upon the evidence compiled to date, the claimant has failed to meet her burden of proof that respondent had a payroll exceeding \$20,000 in 2002 or could reasonably estimate such a payroll in 2003. The Board affirms the SALJ's determination that the claimant did not sustain her burden of proof to establish that respondent had a sufficient annual payroll to be covered by the Workers Compensation Act.

As provided by the Act, preliminary hearing findings are not final but subject to modification either upon presenting additional evidence at another preliminary hearing or upon a full hearing on the claim.⁴

WHEREFORE, it is the finding, decision and order of the Board that the Order of Special Administrative Law Judge Vincent L. Bogart dated April 19, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2004.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Hoang Bach, Pro Se, 601 N. West St. #212, Wichita, KS 67203
Andrew E. Busch, Attorney for WCF
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ See K.S.A. 44-534a(a)(2)(Furse 2000).